

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE:  
BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION  
(MDL NO. 2406)**

**Master File No. 2:13-CV-20000-RDP  
This Document Relates to  
Provider Track Cases**

**PROVIDER PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY  
REGARDING THE PARTIES' MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT ON THE STANDARD OF REVIEW**

The Ninth Circuit recently held that a real estate listing service had adequately alleged that its competitors' group boycott must be judged under the *per se* rule. *The PLS.com, LLC v. Nat'l Ass'n of Realtors*, \_\_\_ F. 4th \_\_\_, 2022 WL 1218792 (9th Cir. Apr. 26, 2022). In doing so, the court made two important points relevant to the parties' motions for partial summary judgment on the standard of review.

The first point supports the Providers' Motion for Partial Summary Judgment Regarding the Standard of Review for Their Group Boycott Claims (Doc. No. 2729). The Blues argue in response to the motion that the Providers' group boycott claim cannot be judged under the *per se* rule because there is a dispute about the proper definition of the relevant market. (Doc. No. 2756 at 24–25.) In particular, they cite their expert's opinion that the relevant market is a two-sided platform under *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). The Ninth Circuit rejected this exact argument:

A plaintiff is not required to define a particular market for a *per se* claim, *see Bd. of Regents of Univ. of Okla.*, 468 U.S. at 100, 104 S.Ct. 2948; *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104 (9th Cir. 1999), nor is it required to do so for a rule of reason claim based on evidence of the actual anticompetitive impact of the challenged practice, *see Ind. Fed'n of Dentists*, 476 U.S. at 460–61, 106 S.Ct. 2009. PLS is therefore correct that *Amex* does not apply to these claims.

*The PLS.com*, 2022 WL 1218792, at \*10. By focusing on the definition of the relevant market, the

Blues are jumping over the question at issue in the Providers' motion—what standard of review applies?—to a different issue: how should the market be defined if the claim is evaluated under the rule of reason? The Ninth Circuit's refusal to skip over the question at hand is consistent with this Court's recent decision on the Providers' motion for summary judgment regarding the effect of *Amex* on the standard of review: "So, the issue in *Amex* was not whether the rule of reason applied, but how that rule should apply in a two-sided market case. Obviously, this begs the question of how the *Amex* decision could have any effect on the applicable standard of review here." Doc. No. 2901 at 2. It is also consistent with the Blues' own concession that "*Amex* is not a standard-of-review decision," and "*Amex* is not dispositive of the standard of review." Doc. No. 2752 at 12.

The second point undermines the Blues' contention in their own motion for summary judgment that changes to the Blues' system resulting from the Subscriber settlement—particularly the elimination of the National Best Efforts rule—require a determination *now* that the rule of reason applies to the Blues' agreements going forward. Doc. No. 2728 at 1. These changes postdate the close of discovery in the Providers' case, although there will be some limited reopening of discovery on these and other issues if the case goes to trial. The Ninth Circuit recognized that whether the standard of review can be determined depends on the stage of the case: "Although we hold that PLS has adequately alleged a *per se* group boycott, we leave to the district court to determine in the first instance whether it should apply *per se* analysis or rule of reason analysis at later stages in this litigation." *The PLS.com*, 2022 WL 1218792, at \*9. Here, the parties have not had the opportunity to conduct discovery or to present evidence on the effect of eliminating National Best Efforts on Providers, although the Providers have identified a mechanism for the Blues to mitigate the benefit to healthcare providers that unbranded entry would provide. Doc. No.

2747 at 30 n.6. The paucity of evidence on this issue and a live dispute about the factual implications of the changes to the Blue system preclude summary judgment in the Blues' favor. *See id.* at 9 (citing cases in which a decision on the standard of review was made after the presentation of evidence at trial). Moreover, the first issue to be decided by the jury is the retrospective one of whether the Providers are entitled to damages based upon the conduct of the Defendants while the National Best Efforts rule was in place. When the jury decides for the Providers and awards damages, the Court will then decide whether to award injunctive relief, and the Court should not decide the standard of review to be applied until that "later stage" after development of the factual record and findings by the jury.

Dated: May 13, 2022

Respectfully submitted,

/s/ Edith M. Kallas

Edith M. Kallas – **Co-Lead Counsel**  
WHATLEY KALLAS, LLP  
152 West 57<sup>th</sup> Street  
41<sup>st</sup> Floor  
New York, NY 10019  
Tel: (212) 447-7060  
Fax: (800) 922-4851  
Email: ekallas@whatleykallas.com

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr. – **Co-Lead Counsel**  
W. Tucker Brown  
WHATLEY KALLAS, LLP  
2001 Park Place North  
1000 Park Place Tower  
Birmingham, AL 35203  
Tel: (205) 488-1200  
Fax: (800) 922-4851  
Email: jwhatley@whatleykallas.com  
tbrown@whatleykallas.com

Patrick J. Sheehan  
WHATLEY KALLAS, LLP  
101 Federal Street  
19<sup>th</sup> Floor  
Boston, MA 10019  
Tel: (617) 573-5118  
Fax: (617) 371-2950  
Email: psheehan@whatleykallas.com

Deborah J. Winegard  
WHATLEY KALLAS, LLP  
1068 Virginia Avenue, NE  
Atlanta, GA 30306  
Tel: (404) 607-8222  
Fax: (404) 607-8451  
Email: dwinegard@whatleykallas.com

Henry C. Quillen  
WHATLEY KALLAS, LLP  
159 Middle Street, Suite 2C  
Portsmouth, NH 03801  
Tel: (603) 294-1591  
Fax: (800) 922-4851  
Email: hquillen@whatleykallas.com

Charles Clinton Hunter  
HAYES HUNTER PC  
4265 San Felipe, Suite 1000  
Houston, TX 77027  
Tel: (281) 768-4731  
Fax: (713) 583-7047  
Email: chunter@hayeshunterlaw.com

Dennis Pantazis – ***Plaintiffs' Steering Committee***  
Brian Clark – ***Discovery Committee***  
WIGGINS CHILDS PANTAZIS FISHER  
GOLDFARB  
The Kress Building  
301 Nineteenth Street North  
Birmingham, AL 35203  
Tel: (205) 314-0500  
Fax: (205) 254-1500  
Email: dgp@wcqp.com  
bclark@wcqp.com

E. Kirk Wood, Jr. – ***Local Facilitating Counsel***  
WOOD LAW FIRM LLC  
P. O. Box 382434  
Birmingham, AL 35238  
Tel: (205) 612-0243  
Fax: (205) 705-1223  
Email: ekirkwood1@bellsouth.net

Aaron S. Podhurst – ***Plaintiffs' Steering Committee***  
Peter Prieto – ***Chair, Expert Committee***  
PODHURST ORSECK, P.A.  
One S.E. 3rd Avenue  
Suite 2300  
Miami, FL 33131  
Tel: (305) 358-2800  
Fax: (305) 358-2382  
Email: apodhurst@podhurst.com  
pprieto@podhurst.com

U.W. Clemon – ***Plaintiffs' Steering Committee***  
U. W. Clemon, LLC  
5202 Mountain Ridge Parkway  
Birmingham, AL 35222  
Tel: (205) 837-2898  
Email: clemonu@bellsouth.net

Dennis C. Reich – ***Chair, Damages Committee***  
REICH & BINSTOCK, LLP  
4265 San Felipe, Suite 1000  
Houston, TX 77027  
Tel: (713) 622-7271  
Fax: (713) 623-8724  
Email: dreich@rbfirm.net

J. Mark White – ***Litigation Committee***  
Augusta S. Dowd – ***Chair, Litigation Committee***  
Linda G. Flippo – ***Discovery Committee***  
WHITE ARNOLD & DOWD, P.C.  
The Massey Building  
2025 Third Avenue North, Suite 500  
Birmingham, AL 35203  
Tel: (205) 323-1888  
Fax: (205) 323-8907  
Email: mwhite@whitearnold dowd.com  
adowd@whitearnold dowd.com  
lflippo@whitearnold dowd.com

Nicholas B. Roth – ***Chair, Discovery Committee***  
Julia Smeds Roth – ***Discovery Committee***  
EYSTER KEY TUBB ROTH MIDDLETON & ADAMS, LLP  
402 East Moulton Street, SE  
Decatur, AL 35602  
Tel: (256) 353-6761  
Fax: (256) 353-6767  
Email: nbroth@eysterkey.com  
jroth@eysterkey.com

Van Bunch – ***Chair, Class Certification Committee***  
BONNETT FAIRBOURN FRIEDMAN & BALINT, P.C.  
2325 E. Camelback Road, Suite 300  
Phoenix, AZ 85016  
Tel: (602) 274-1100  
Fax: (602) 274-1199  
Email: vbunch@bffb.com

David A. Balto – ***Expert Committee***  
THE LAW OFFICES OF DAVID A. BALTO  
1350 I Street, N.W., Suite 850  
Washington, DC 20005  
Tel: (202) 789-5424  
Fax: (202) 589-1819  
Email: david.balto@dcantitrustlaw.com

Robert J. Axelrod – ***Chair, Written Submissions Committee***  
AXELROD LLP  
800 Third Avenue, Suite 2800  
New York, NY 10022  
Tel: (646) 448-5263  
Fax: (212) 840-8560  
Email: rjaxelrod@axelroddlp.com

Joey K. James – ***Litigation Committee***  
BUNCH & JAMES  
P. O. Box 878  
Florence, AL 35631  
Tel: (256) 764-0095  
Fax: (256) 767-5705  
Email: joey@bunchandjames.com

W. Daniel Miles, III – ***Written Submissions Committee***  
BEASLEY ALLEN CROW METHVIN PORTIS & MILES, P.C.  
218 Commerce Street  
Montgomery, AL 36104  
Tel: (800) 898-2034  
Fax: (334) 954-7555  
Email: dee.miles@beasleyallen.com

Richard S. Frankowski – ***Discovery Committee***  
THE FRANKOWSKI FIRM, LLC  
231 22<sup>nd</sup> Street South, Suite 203  
Birmingham, AL 35233  
Tel: (205) 390-0399  
Fax: (205) 390-1001  
Email: richard@frankowskifirm.com

John C. Davis – ***Written Submissions Committee***  
LAW OFFICE OF JOHN C. DAVIS  
623 Beard Street  
Tallahassee, FL 32303  
Tel: (850) 222-4770  
Email: john@johndavislaw.net

Mark K. Gray – ***Discovery Committee***  
GRAY & WHITE  
713 E. Market Street, Suite 200  
Louisville, KY 40202  
Tel: (502) 805-1800  
Fax: (502) 618-4059  
Email: mgray@grayandwhitelaw.com

Stephen M. Hansen – ***Class Certification Committee***  
LAW OFFICE OF STEPHEN M. HANSEN  
1821 Dock Street  
Tacoma, WA 98402  
Tel: (253) 302-5955  
Fax: (253) 301-1147  
Email: steve@stephenmhansenlaw.com

Harley S. Tropin – ***Damages Committee***  
Javier A. Lopez – ***Discovery Committee***  
KOZYAK TROPIN &  
THROCKMORTON, P.A.  
2525 Ponce De Leon Boulevard, 9th Floor  
Miami, FL 33134  
Tel: (305) 372-1800  
Fax: (305) 372-3508  
Email: hst@kttlaw.com  
jal@kttlaw.com

Michael C. Dodge – ***Expert Committee***  
GLAST PHILLIPS & MURRAY, P.C.  
14801 Quorum Drive, Suite 500  
Dallas, TX 75254  
Tel: (972) 419-7172  
Email: mdodge@gpm-law.com

Michael E. Gurley, Jr. – ***Discovery Committee***  
Attorney at Law  
24108 Portobello Road  
Birmingham, AL 35242  
Tel: (205) 908-6512  
Email: mgurleyjr@yahoo.com

Lynn W. Jinks, III – ***Expert Committee***  
Christina D. Crow – ***Discovery Committee***  
JINKS CROW & DICKSON, P.C.  
219 North Prairie Street  
Union Springs, AL 36089  
Tel: (334) 738-4225  
Fax: (334) 738-4229  
Email: ljinks@jinkslaw.com  
ccrow@jinkslaw.com

Myron C. Penn – ***Discovery Committee***  
PENN & SEABORN, LLC  
53 Highway 110  
Post Office Box 5335  
Union Springs, AL 36089  
Tel: (334) 738-4486  
Fax: (334) 738-4432  
Email: myronpenn28@hotmail.com

J. Preston Strom, Jr. – ***Litigation Committee***  
STROM LAW FIRM, LLC  
2110 N. Beltline Boulevard, Suite A  
Columbia, SC 29204-3905  
Tel: (803) 252-4800  
Fax: (803) 252-4801  
Email: petestrom@stromlaw.com

C. Wes Pittman – ***Settlement Committee***  
THE PITTMAN FIRM, P.A.  
432 McKenzie Avenue  
Panama City, FL 32401  
Tel: (850) 784-9000  
Fax: (850) 763-6787  
Email: wes@pittmanfirm.com

Robert B. Roden – ***Litigation Committee***  
SHELBY RODEN, LLC  
2956 Rhodes Circle  
Birmingham, AL 35205  
Tel: (205) 933-8383  
Fax: (205) 933-8386  
Email: rroden@shelbyroden.com

Gary E. Mason – ***Class Certification Committee***  
WHITFIELD BRYSON & MASON, LLP  
1625 Massachusetts Ave. NW, Suite 605  
Washington, DC 20036  
Tel: (202) 429-2290  
Fax: (202) 640-1160  
Email: gmason@wbmllp.com

Michael L. Murphy – ***Discovery Committee***  
BAILEY GLASSER LLP  
910 17<sup>th</sup> Street, NW, Suite 800  
Washington, DC 20006  
Tel: (202) 463-2101  
Fax: (202) 463-2103  
Email: mmurphy@baileyglasser.com

Lance Michael Sears  
SEARS & SWANSON, P.C.  
First Bank Building  
2 North Cascade Avenue, Suite 1250  
Colorado Springs, CO 80903  
Tel: (719) 471-1984  
Fax: (719) 577-4356  
Email: lance@searsassociates.com

Thomas V. Bender – ***Discovery Committee***  
Dirk L. Hubbard  
HORN AYLWARD & BANDY, LLC  
2600 Grand Blvd., Suite 1100  
Kansas City, MO 64108  
Tel: (816) 421-0700  
Email: tbender@hab-law.com  
dhubbard@hab-law.com

Gregory S. Cusimano – ***Litigation Committee***  
CUSIMANO, ROBERTS & MILLS, LLC  
153 South 9<sup>th</sup> Street  
Gadsden, AL 35901  
Phone: (256) 543-0400  
Fax: (256) 543-0488  
Email: greg@alalawyers.net

Brian E. Wojtalewicz  
WOJTALEWICZ LAW FIRM, LTD.  
139 N. Miles Street  
Appleton, MN 56208  
Tel: (320) 289-2363  
Fax: (320) 289-2369  
Email: brian@wojtalewiczlawfirm.com

Archie C. Lamb, Jr.  
ARCHIE LAMB & ASSOCIATES, LLC  
301 19<sup>th</sup> Street North, Suite 585  
The Kress Bldg.  
Birmingham, AL 35203-3145  
(205) 458-1210  
Email: alamb@archielamb.com

Paul Lundberg  
LUNDBERG LAW, PLC  
600 4TH Street, Suite 906  
Sioux City, IA 51101  
Tel: (712) 234-3030  
Fax: (712) 234-3034  
Email: paul@lundberglawfirm.com

Jessica Dillon  
Ray R. Brown  
Molly Brown  
DILLON & FINDLEY, P.C.  
1049 W. 5th Avenue, Suite 200  
Anchorage, AK 99501  
Tel: (907) 277-5400  
Fax: (907) 277-9896  
Email: [Jessica@dillonfindley.com](mailto:Jessica@dillonfindley.com)  
[Ray@dillonfindley.com](mailto:Ray@dillonfindley.com)  
[Molly@dillonfindley.com](mailto:Molly@dillonfindley.com)

Gwen Simons  
Simons & Associates Law, P.A.  
P.O. Box 1238  
Scarborough, ME 04070-1238  
Tel: (207) 205-2045  
Fax: (207) 883-7225  
Email: [gwen@simonsassociateslaw.com](mailto:gwen@simonsassociateslaw.com)

Cynthia C. Moser  
HEIDMAN LAW FIRM  
1128 Historic 4th Street  
P. O. Box 3086  
Sioux City, IA 51101  
Tel: (712) 255-8838  
Fax (712) 258-6714  
Email: [Cynthia.Moser@heidmanlaw.com](mailto:Cynthia.Moser@heidmanlaw.com)